IN THE

SUPREME COURT OF THE UNITED STATES

No. 77-1598

KENNETH HAMMOND,
Petitioner,

vs.

STATE OF ALABAMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Court of Criminal Appeals of Alabama

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To the Court of Criminal Appeals of Alabama

Petitioner, Kenneth Hammond, prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Alabama, entered March 1, 1977, affirming his conviction under Title 14, §326 of the Code of Alabama (1967), that is, inciting to a felony, and that on hearing the judgment of conviction be reversed.

OPINION BELOW

The opinion of the Alabama Court of Criminal Appeals (App. A., *infra*, pp. A-1–A-27) has not been reported.

JURISDICTION

The judgment of the Alabama Court of Criminal Appeals was entered on March 1, 1977 (App. A., *infra*, pp. A-1–A-27). A timely petition for a writ of certiorari was filed with the Supreme Court of Alabama, and the writ was granted on June 22, 1977. After the submission of briefs and oral argument before the Court, the writ was quashed as improvidently granted on December 16, 1977. (App. B, *infra*, pp. A-28–A-33) A timely application for rehearing was filed and was overruled on February 10, 1978. (App. C, *infra*, pp. A-34–A-35)

This Court has jurisdiction under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether alternative allegations stated in a single count of an indictment denied petitioner his right to be informed of the nature of the charges against him, as is required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

2. Whether the "inciting to felony" charge against petitioner was so completely devoid of evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment to the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment of the Constitution of the United States, Title 14, §326 (a1-a4), Code of Alabama (1967); Title 14, §63, Code of Alabama (1943); and Title 15, §247, Code of Alabama (1940) are set forth in Appendix D, *infra*, pp. A-36–A-38.

STATEMENT OF THE CASE

An indictment was returned by the Grand Jury of Montgomery County, Alabama, against Kenneth Hammond on August 8, 1975, alleging, in Count I, that he

> did unlawfully incite, towit [sic]: John Moore, Rex Moore or Charles Price to a felony, towit [sic]: Bribery of an executive, legislative or judicial officer, in that the said Kenneth Hammond, alias Ken Hammond, alias "Bozo" Hammonds, induced, procured or caused, or made an effort or endeavor to induce, procure or cause the said, towit [sic]: John Moore, Rex Moore, or Charles Price to corruptly offer, promise or give to an executive, legislative or judicial officer, towit [sic]: Kenneth Hammond, President, Public Service Commission, State of Alabama, after his election to said office, a gift, gratuity or thing of value, towit [sic]: money or proceeds from or in connection with operation of certain vending machines in, towit [sic]: South Central Bell Telephone Company buildings, Montgomery, Alabama, in the amount of, towit [sic]: $10,000 with the intent to influence the act, vote, opinion, decision or judgment on a cause, matter or proceeding then pending or which may be by law brought before the said Kenneth Hammond in his official capacity as President, Public Service Commission, State of Alabama, towit [sic]: a telephone rate or charge increase requested by South Central Bell Telephone Company styled, towit [sic]: South Central Bell Telephone Company, Petitioner: Petition for Approval of New Schedules of Rates and Charges for Intrastate Telephone Service, Alabama Public Service Commission Docket 16966, contrary to law and against the peace and dignity of the State of Alabama.

According to the literal terms of this charge, and the court's instructions to the jury, a conviction could be had if the govern-

ment proved beyond a reasonable doubt that Hammond incited either John Moore, Rex Moore, or Charles Price to commit bribery. As is briefly discussed below, these alternative charges related to widely disparate and complex factual transactions. Hammond was also accused of inciting the same persons to attempt to bribe him and with accepting a bribe, in Counts II and III of the indictment, respectively.[1] Both counts alleged the same facts as Count I and in the same manner as quoted above. (App. E, *infra*, pp. A-39–A-41)

Counsel for Hammond filed a Motion to Quash the indictment in the Circuit Court of Montgomery County, Alabama on November 10, 1975, which requested that the indictment be dismissed, alleging, inter alia, that the individual counts within the indictment failed to adequately charge an offense. Hammond's counsel simultaneously filed a Demurrer to the indictment alleging that the indictment failed to adequately set forth and inform the defendant as to the nature of the charges against him. Particularly, the demurrer alleged that the indictment was fatally insufficient because it alleged, in the disjunctive, that any one of three different individuals, were the objects of Hammond's "incitement" efforts. Both of these motions were denied by the Court at oral argument on November 25, 1975.[2]

According to the proof submitted at trial, Hammond was the president of the Alabama Public Service Commission from January, 1973 to December, 1975, and was therefore able to vote on rate increases for certain public utilities, including South Central

[1] After the defense had presented its case, and on petitioner's motion, the trial court required the State to elect one of the three counts of the indictment. The State elected Count I, and that being the count under which petitioner was convicted, this petition will be addressed only to issues relevant to Count I.

[2] There is no Alabama procedure for clarification of an indictment, such as by a bill of particulars. *Johnson v. State*, 335 So.2d 663 (Ala. Ct. App.), *cert. denied*, 335 So.2d 678 (1976).

Bell. (Tr. 540) Rex Moore and his son, John, two of the alleged "incitees" in Count I, approached Hammond in 1973 with requests that he assist them in placing vending machines in a plant owned by South Central Bell. (Tr. 167, 305) Although the Moores, who were shareholders and employees of the Tops Vending Machine Company, testified that Hammond requested payments of money in return for his assistance, there was no evidence that either of the Moores had or claimed to have any interest in South Central Bell or in the pending rate increase request, as alleged in the indictment.[3]

Hammond approached Charles Price, a vice-president of South Central Bell and the third alleged "incitee," and requested that Price do what he could to see if the Moores' machines could be installed in the plant. (Tr. 386) The Moores were notified in January, 1975, by Vernon Lockard, a South Central Bell district plant manager, that they would be allowed to install their machines in the plant, and they did so. (Tr. 309)

In February, 1975, South Central Bell filed a request for an approximately $59 million rate increase with the Public Service Commission. (Tr. 391) In June or July, 1975, Hammond spoke to Price and requested that the Moores' machines be removed because "they [were] a bunch of crooks." (Tr. 390) Hammond testified that he had reconsidered his role in the affair after discussing the Moores' offers of payments with his wife and son, and that this discussion prompted him to request that the machines be removed. (Tr. 582) Price testified that he feared Hammond might not be favorably disposed toward the proposed rate hike if the machines were not removed. At no time was there any reference to the phone company or the pend-

[3] Hammond accepted $200 from the Moores, although the purpose of this payment was unclear. Indeed, the Court of Criminal Appeals recognized that this exceedingly prejudicial evidence bore no relationship to the charges in the indictment. (App. A. *infra*, pp. A-13—A-14)

ing rate increase request. (Tr. 402) Price stated that Hammond had, in his opinion, always acted fairly with respect to the telephone company, and that he had never made any threats or promises about a rate increase. (Tr. 427)

Based on the foregoing evidence, the jury found Hammond guilty of Count I and he was sentenced to three years imprisonment. On appeal, the Court of Criminal Appeals affirmed, stating that

> [o]f the three alternatives charged in Count I, the State totally fails to prove two and barely proves the third. . . . A complex and many-faceted count is the basis for depriving [Hammond] of his liberty. We have been presented with a hodge-podge of facts and are told that upon one theory or another, they substantially prove every material allegation of the indictment. In order to find one theory or one alternative which would support the instant conviction, it has been necessary to fit facts together like connecting pieces of a complex jigsaw puzzle. . . . The evidence that [Hammond] incited Price to bribe him . . . is far from overwhelming. Yet, we find it to be sufficient to meet the bare minimum standards to support the verdict of the jury.

(App. A, *infra*, pp. A-19–A-20) The Court conceded that the conviction could not be supported if Hammond demanded the withdrawal of the Moores' machines out of a desire for revenge or self-satisfaction. However, the court speculated that, although there was no evidence Hammond sought any money from Price, his insistence that the machines be withdrawn was motivated by the hope that Price would transmit his request to the Moores (who might view it as an ultimatum and pay money to Hammond). Further, since Price was concerned about the rate request, his motivation for attempting to comply with Hammond's demand was to influence Hammond's consideration of that request. (App. A, *infra*, p. A-3)

The Supreme Court of Alabama, after granting Hammond's petition for a writ of certiorari, quashed the writ as improvidently granted. Two justices dissented, arguing that the Court had in effect sanctioned a new standard of review in a criminal case—the "bare minimum" standard—and in doing so had violated Hammond's Fourteenth Amendment due process rights. (App. B, *infra*, p. A-33)

REASONS FOR GRANTING THE WRIT

1. The Court of Criminal Appeals of Alabama Departed From the Well-Recognized Constitutional Requirement That an Indictment Must Inform the Accused of the Nature of the Charges Against Him.

The Due Process Clause of the Fourteenth Amendment requires, at a minimum, that a criminal offense be charged with such certainty as is necessary to apprise the defendant of the nature of the charge against him and to protect the defendant from being put in jeopardy for the same offense in the event future action is taken against him. *Hamling v. United States*, 418 U.S. 87, 117-118 (1973); *Russell v. United States*, 369 U.S. 749, 763-64 (1962). *See also, e.g., United States v. Hollinger*, 553 F.2d 535, 548-49 (7th Cir. 1977); *United States v. Chenaur*, 552 F.2d 294 (9th Cir. 1977). While there is no federal constitutional requirement that state court felony prosecutions be instituted by grand jury indictment, *Hurtado v. California*, 110 U.S. 516 (1884), the state must still comply with due process requirements whether it proceeds by indictment or otherwise. *Cameron v. Hauck*, 383 F.2d 966, 969 (5th Cir. 1967), *cert. denied*, 389 U.S. 1039 (1968); *Mayo v. Blackburn*, 250 F.2d 645, 647 (5th Cir.), *cert. denied*, 356 U.S. 938 (1958).

This case highlights a direct clash between the principle set forth in *In Re Confiscation Cases*, 20 Wall 92, 87 U.S. 92

(1873), and the practice approved by the Alabama court. Specifically, the federal doctrine, which is founded on the Due Process Clause, prohibits the allegation of several different acts in the disjunctive within a single count of an indictment, because such an indictment does not inform a defendant of the charges against him. *In Re Confiscation Cases, supra,* at 104. *See also, United States v. Bean,* 564 F.2d 700, 705 (5th Cir. 1977); *Price v. United States,* 150 F.2d 283 (5th Cir. 1945), *cert. denied,* 326 U.S. 789 (1946); *Troutman v. United States,* 100 F.2d 628, 631 (10th Cir. 1938); *O'Neill v. United States,* 19 F.2d 322, 324 (8th Cir. 1927); *Ackley v. United States,* 200 F. 217, 221 (8th Cir. 1912); *United States v. Malinowski,* 347 F. Supp. 347, 352 (D.C. Pa. 1972), *cert. denied,* 411 U.S. 970 (1973); *United States v. H. L. Blake Co., Inc.,* 189 F. Supp. 930, 934 (D.C. Ark. 1960); *United States v. Wells,* 180 F. Supp. 707, 709 (D.C. Del. 1959); *United States v. Mackenzie,* 170 F. Supp. 797, 799 (D.C. Maine 1959); *United States v. Dedof,* 42 F. Supp. 57 (D.C. Pa. 1941).

The Alabama court sustained a conviction on an indictment which charged multiple factual schemes, each of which could have constituted a separate crime.[4] This action violates the standards of due process set forth in *In Re Confiscation Cases, supra. See also, United States v. Hairrell,* 521 F.2d 1264, 1266 (6th Cir.), *cert. denied,* 423 U.S. 1035 (1975); *United States v. Martinez-Gonzales,* 89 F. Supp. 60 (D.C. Cal. 1950). *Compare, United States v. Anderson,* 368 F. Supp. 1253, 1259 (D.C. Md. 1973) (count charging conspiracy to extort two corporations sufficient when scheme involved a joint venture of the corporations).

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[4] Alabama has approved by statute the inclusion of alternative means for commiting a single offense within one count. Title 15, § 247, Code of Alabama (1940). The statute does not provide for the consolidation of different transactions, each of which constitutes a separate offense. For example, it is proper to allege, in a single count, murder "by cutting with a knife or shooting with a gun." *Dudley v. State,* 185 Ala. 27, 64 So. 309 (1914).

The indictment was not only invalid on its face as a matter of federal constitutional law, Hammond was in fact deprived of a fundamentally fair trial. The remaining count of this indictment presented Hammond with a bewildering choice of alternative offenses for which to prepare and present a defense. The three possible alternatives rested upon distinct theories of prosecution and distinct facts. Hammond's ability to prepare a defense was further impeded by the complexity of the ultimate theory of prosecution, which is barely cognizable even in retrospect.

Moreover, as more fully discussed below, the disjunctive allegations effectively negate the possibility of a fair review of the conviction on appeal. The disjunctive allegations in Count I not only failed to inform the petitioner of the charge against him, but allowed the jury to anonymously select one of three transactions for which to find him guilty. The Court of Criminal Appeals recognized that there was a complete lack of evidence on two of the alternatives. However, it is entirely possible that the jury convicted Hammond on the basis of one of those two grounds, *see* footnote 3, *supra,* and if so, his conviction would be invalid even under the analysis of the court below.

2. **The Court of Criminal Appeals of Alabama Breached the Due Process Clause of the Fourteenth Amendment by Concluding That Any Evidence Supported the Charge Against Petitioner.**

The Court of Criminal Appeals recognized the complete absence of any evidence to support two of the three disjunctive allegations contained in Count I, but found sufficient evidence to support the third allegation. As is discussed below, the allegation of several different transactions in the disjunctive requires that the reviewing court find sufficient evidence to support *each* of the alternatives. Further, notwithstanding the Court's conclusion that a "bare minimum" of evidence was present to support the third alternative, the conviction was "so totally devoid of evidentiary support as to render [it] void under the Due Process

Clause of the Fourteenth Amendment." *Garner v. Louisiana*, 368 U.S. 157, 163 (1961); *Thompson v. City of Louisville*, 362 U.S. 199 (1960).

According to *Turner v. United States*,

> [t]he general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the *conjunctive* . . . the indictment stands if the evidence is sufficient with respect to any one of the acts charged.

396 U.S. 398, 420 (1970) (emphasis supplied). Application of this rule is limited, however, to conjunctive allegations of several different *means* of committing the same offense, and not to alternative expressions of different factual transactions, each of which might state a separate offense. *See, e.g., United States v. Gunter*, 546 F.2d 861 (10th Cir. 1976), *cert. denied*, 430 U.S. 947 (1977); *United States v. Jones*, 491 F.2d 1382 (9th Cir. 1974). In the instant case, Count I alleges three such separate transactions in the alternative. *See* discussion *supra* at p. 10.

Further, the rule embodied in *Turner v. United States, supra*, does not apply when acts are alleged in the *disjunctive*. As in this case, the existence of alternative accusations within a single count of an indictment renders it impossible for the reviewing court to evaluate the sufficiency of the evidence. *United States v. Tarnopol*, 561 F.2d 466, 475 (3rd Cir. 1977); *United States v. Dansker*, 537 F.2d 40, 51 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); *Bins v. United States*, 331 F.2d 390, 393 (5th Cir.), *cert. denied*, 379 U.S. 880 (1964). *Compare, Hornsby v. State*, 94 Ala. 55, 10 So. 522 (1892) (general verdict of guilty is sufficient when indictment charges different *means* in the alternative).

Under the state's ultimate theory of prosecution (that is, the only theory which the Court of Criminal Appeals found to be

supportable by the evidence), Hammond sought a "thing of value" from Charles Price, rather than a $10,000 portion of the vending machine proceeds, as alleged in the indictment. No direct evidence supports this theory; the appellate court rested its decision on a finding that "Price acted on several occasions to influence [Hammond's] official actions." While the court conceded that there was no evidence that "Price was incited to pay any money to" Hammond, it concluded that the jury could have found that Hammond hoped his request would be transmitted to the Moores via Price, and that the Moores would respond by making a payment to Hammond.

This conclusion completely ignores the requirement that the state prove Hammond made this request to Price with the intent to threaten Price with adverse action on the rate increase request. *See, e.g., Rogers v. State*, 23 Ala. App. 149, 122 So. 308 (1929). Hammond denied possessing such intent. According to all of the evidence in the case, no mention was ever made by any party of the rate increase request. The appellate court concluded, however, that *Price* felt Hammond "would not look favorably on the Bell request for a rate increase if the machines were not removed." Accordingly, there is a fatal absence of a finding or any evidence to support a finding that Hammond intended to threaten Price with adverse action taken in his official capacity, with respect to the rate increase or otherwise. The verdict rendered by the jury is supported solely by conjecture, if at all. This condition is inconsistent with due process of law, and was created by the incomprehensible theory of prosecution posited by the State.

In summary, the Court of Criminal Appeals has approved a form of accusation which infected the entire proceedings below. This impermissible taint was grossly compounded by the complete absence of evidence to support the verdict returned by the jury.

Hammond submits that in view of the conflict between the federal constitutional principles which have developed relating to the charge of and proof of a criminal offense, and the purported application of those principles in the case below, review by this Court is warranted. Without such review, Hammond would be deprived of his right to a fair trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES F. NEAL
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May, 1978

APPENDIX

APPENDIX A

The State of Alabama—Judicial Department

The Alabama Court of Criminal Appeals

October Term, 1976-77

3 Div. 444

Kenneth Hammond, alias

v

State

Appeal from Montgomery Circuit Court

PER CURIAM

Appellant was indicted by the Montgomery County Grand Jury on August 8, 1975, on three counts:

(1) Inciting to a felony, bribery;

(2) Inciting to a felony, attempted bribery;

(3) Accepting a bribe.

The State elected to go to the jury on Count I only, and appellant was found guilty thereon and sentenced to three years in the penitentiary.

The State's Case

A short synopsis of the evidence against the appellant is here set out in a light most favorable to the State. The appellant was the president of the Alabama Public Service Commission

(hereinafter P.S.C.) from January 1973 to December 1975. Rex Moore and John Moore were majority stockholders in Tops Vending Machine Company (hereinafter Tops). During 1973 the Moores approached the appellant in order to solicit his help in securing the vending machine business in a South Central Bell Telephone Company (hereinafter Bell) plant on Adams Street in Montgomery. The Moores testified that the appellant then stated that he would have to receive $10,000.00 for his services. The Moores stated that they could not afford to pay that much.

In November 1974, Rex Moore received a telephone call from Mr. Vernon Lockard, an employee of Bell, about installing vending machines in the Adams Street plant. Rex Moore again met with the appellant at which time Moore said the appellant asked for $5,000.00 for his help in securing the vending machine business. Rex Moore replied that he could not afford to pay that amount. Subsequent to his conversation with the appellant, Rex Moore was informed by Mr. Lockard that Tops would not get the vending machine business at the Adams Street plant, however, in January of 1975, Mr. Lockard allowed Tops to install vending machines in that plant. The commission from the machines went to the Pioneer Club, an employee organization, not to Bell.

Charles Price was a Bell vice president in charge of public relations. Price had frequent contacts with the appellant and other members of the P.S.C. The appellant asked Price to help Tops get its vending machines into the Adams Street plant. Price complied with the appellant's request. In February 1975, subsequent to the installation of the vending machines, Bell filed with the P.S.C. a request for a rate increase of approximately $59 million. The final order concerning the rate increase was entered in September 1975 (after the arrest and indictment of the appellant). After the installation of the vending machines, Rex Moore said the appellant requested that the Moores pay him

$300.00 per month for his help in placing the machines. The Moores refused, although they did give the appellant a total of $200.00 which he requested as expense money for two State business trips.

Some months after the machines were installed, the appellant contacted Price to have Tops' machines removed, stating that the Moores were "a bunch of crooks." The appellant said Price would not get what he needed unless the machines were removed. From that Price concluded that the appellant would not look favorably on the Bell request for a rate increase if the machines were not removed. At first Price did nothing, but appellant began to pressure him more and more to have the machines removed from the Bell plant. Price finally went to the Moores and told them to settle their problems with the appellant.

Rex Moore testified that because of incessant demands for money by the appellant and because of pressure from Price to settle with appellant, he informed the Attorney General of the circumstances involved in this case. Agents of the State had Rex Moore call appellant and arrange to meet in a local truck stop restaurant on July 8, 1975. Those agents wired Rex Moore with a transmitter and recorded his conversation with appellant. Based upon Moore's complaint and the recorded conversation, a warrant for appellant's arrest was issued on July 12, 1975, and on August 8, appellant was indicted by the grand jury. The recording was admitted into evidence and played for the jury during the trial.

The Appellant's Case

The appellant testified in his own defense. It was his contention that the Moores were the instigators of the whole affair. He said Rex Moore offered him money to help place Tops' machines in the Bell plant. Appellant denied ever ask-

ing the Moores for money or accepting money in connection with placing the machines in the Bell plant. He steadfastly denied ever having implied to Price that he should put pressure on the Moores in turn for a Bell rate increase. The appellant argues at length in his brief that the Attorney General prosecuted him solely for political reasons. A number of witnesses testified as to appellant's good character.

I

Since the State elected to go to the jury on Count I only, appellant's contention that one of the other two counts was improperly amended was thereby rendered moot. Only the count upon which appellant was found guilty is subject to appellate review.

A

Among numerous motions and pleadings, on November 10, 1975, appellant filed a motion to quash the indictment. One ground set out in the motion to quash was that the grand jury which returned the instant indictment, "was not in compliance with the requirements of the laws of the state of Alabama in obtaining the general cross-section of the community. . . ."

The State contends that the Montgomery County Jury Commission, acting under a federal court order, was required to fill the jury box by taking every fifth name from the voting list of Montgomery County. Appellant contends that such a system fails to fully comply with Alabama statutes on establishing jury lists. The testimony did establish that every fifth name was selected from a computer printout of the Montgomery County voters list.

In support of its position, the State cites *Higginbotham v. State*, 54 Ala.App. 633, 312 So.2d 31 (1975). In *Higginbotham*, the venire was established pursuant to a federal court order relating to the Lowndes County Jury Commission. There, the federal court required the commission to examine not only the voters list of that county, but also the tax assessor's list and the list compiled by the federal examiners, and make up a comprehensive list therefrom. The testimony in that case showed that the Lowndes County Jury Commission complied with the requirements of the federal court order and in addition thereto used every source of names available to them in Lowndes County in compiling the master list. The testimony showed that everyone twenty-one years and older were included on the list. The commission also evaluated each precinct in the county and talked to persons having knowledge of individuals living in the county for the purpose of removing ineligible persons as jurors according to the jury laws of this state.

In the instant case, the Montgomery County Jury Commission in following the federal court order ignored the state law. In the memorandum opinion issued in *Penn et al. v. Eubanks et al.*, Judge Frank Johnson, Jr., on June 6, 1973, stated, "As for the means of selecting this cross-section, this court *commends for the jury commission's consideration* the random jury selection plan used in all federal district courts and in many state courts. See Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1865." (Emphasis supplied.) That court's order stated that, "The jury commission shall examine the voting list and make an alphabetical list therefrom . . ." That order did not go as far as the one issued in *Higginbotham* in allowing the use of other sources in selecting potential jurors.

Judge Johnson's order and opinion relating thereto, set a minimum standard which the Montgomery County Jury Commission must meet in order to comply with federal constitutional provisions. We do not read his order to mean that the jury commission is to completely ignore the statutory requirements of

Alabama law in selecting and qualifying jurors. Alabama law, if administered in good faith, provides a much better cross-section of the community for jury selection than the federal system.

In *Higginbotham*, supra, the Lowndes County Jury Commission complied with both federal and state standards. In the instant case, the Montgomery County Jury Commission meets only the minimum federal requirements and thus violates the requirements of Title 30, § 21, Code of Alabama 1940 as amended. However, the violation of a statutory requirement in filling the jury roll may *not* be taken advantage of by a motion to quash. Title 15, § 278 and Title 30, § 46, Code of Alabama 1940. The only exceptions to the prohibitions of these sections is in case of (1) denial of a constitutional right or (2) fraud.

In addition to the motion to quash the indictment, on October 30, 1975, appellant had filed a plea in abatement to the indictment. Ground 3 is as follows:

> "That the grand jury which returned the indictment against the defendant was not in compliance with the requirements of the laws of the state of Alabama in obtaining the general cross-section of the community, in that upon the information and belief, the venire from which the grand jury was drawn, was taken by a mere selection of each fifth name on the jury list[1] of Montgomery County."

We must now determine if the question of fraud was properly presented in the trial court below and whether an erroneous ruling was made thereon by the trial court.

Gregg v. Maples, 286 Ala. 274, 239 So.2d 198 (1970) holds that a system of jury selection which excludes persons who are not registered voters would not substantially comply with statu-

[1] "Jury list" as used in the plea in abatement is apparently a typographical or clerical error, since all the argument before the trial court and on appeal on this point refers to selection of every fifth name from the "voters list." All parties and the trial court treated the plea as an objection to selection from the *voters* list.

tory requirements that the jury roll contain the names of every citizen living in the county who are generally reputed to be honest, intelligent and esteemed in the community for integrity, good character and sound judgment. In the *Gregg* case, the Alabama Supreme Court held that the method of selecting and compiling the jury roll in Madison County, making sole use of the voter registration list, is a *fraud in law*. To quote from *Gregg*:

> ". . . Fraud used in this sense has been construed as encompassing more than criminal wiles: 'Fraud is a relative term, it includes all acts and omissions which involve a breach of legal duty injurious to others.' Inter-Ocean Cas. Co. v. Banks, supra [32 Ala.App. 225, 23 So.2d 874]. And it has been held that 'When it affirmatively appears that the names of a large number of citizens who possess the qualifications required by law of jurors, are intentionally omitted from the jury roll * * * that is a fraud in law that requires the quashing of a venire * * *. It is not the kind of a jury box contemplated by law. Our statutes do not contemplate * * * any system or scheme of selecting other than the selection of names authorized by law * * *.' 32 Ala.App. at p. 227, 23 So.2d at p. 875, citing Doss v. State, 220 Ala. 30, 123 So. 231."

In *Fikes v. State*, 263 Ala. 89, 81 So.2d 303 (1955), the appellant there filed a motion to quash the indictment on the ground of systematic exclusion. The Alabama Supreme Court set out at length the procedure used in Alabama for compiling jury lists. It went on to hold that "there is no legal reason for quashing an indictment or venire simply because the jury commission did not put the name of every qualified person on the roll or in the jury box, *in the absence of fraud* (or a denial of constitutional rights) . . ."

Fikes was cited by the appellee in *Gregg v. Maples*, supra, as justification for excluding persons not on the voters list. In the

Gregg case, the Alabama Supreme Court pointed out that *Fikes* is a proper statement of the law, except that the appellee had ignored the phrase, "in the absence of fraud . . ."

In *Bell v. Terry*, 213 Ala. 160, 104 So. 336 (1925), the Alabama Supreme Court held that the indictment in that case should not be quashed, *except on a plea in abatement*, sustained by proof that the grand jurors who found the indictment were not drawn by an officer designated by law to draw the same, or that the jury commissioners *fraudulently filled the jury box*.

In *Reese v. State*, 228 Ala. 132, 152 So. 41 (1933), the Alabama Supreme Court held that under our procedural statute (Title 15, § 278, of the present Code), a motion to quash the indictment was not the proper method of presenting questions going to the formation of the grand jury. Such could only be raised by a plea in abatement.

In *Thomas v. State*, 277 Ala. 570, 173 So.2d 111 (1965), the Alabama Supreme Court held that a motion to quash is the proper way to challenge an indictment and trial venire on grounds of intentional racial discrimination. The Court stated:

> "Sections 278 and 285, Title 15, and § 46, Title 30, Code 1940, have been held to be *procedural* statutes, designed to prevent quashing of indictments or venires for *mere* irregularities and to obviate the resulting delays in the administration of justice. Those statutes do not deny to one charged with a crime the right to present for a determination the question of whether the rights guaranteed by the Fourteenth Amendment to the Constitution of the United States have been violated. Vernon v. State, 245 Ala. 633, 18 So.2d 288 . . ." (Emphasis supplied.)

Citing *Bell v. Terry*, supra, this Court in *Mullins v. State*, 24 Ala.App. 78, 130 So. 527 (1930) stated:

> ". . . We conclude from the holding in this case that, notwithstanding sections 8630 and 8637, Code of 1923, fraud in filling the jury box may be taken advantage of either by motion to quash the venire or by plea in abatement to the indictment containing proper averments, supported by proof that the jury box was fraudulently filled . . ."

Sections 8630 and 8637 are found in the present Code as Title 15, § 278 and Title 30, § 46, respectively.

In *Spivey v. State*, 172 Ala. 391, 56 So. 232 (1911), the Supreme Court of Alabama found that where the record affirmatively shows an error was committed by the trial court in the organization of the grand jury, which is fatal to the judgment, on an indictment found by such grand jury, an objection thereto may be taken by a motion in arrest of judgment and also by motion to quash. The Court in that case stated:

> ". . . The jury law has for a long time provided that no objection can be taken to any venire *except for fraud* in the drawing or summoning; yet this objection could not be taken to an indictment, if the grand jury was drawn in the presence of and by the officers designated by law; that is, this question could not be inquired into on a plea in abatement, nor on motion to quash an indictment, if the grand jury was drawn in the presence of, and by officers designated by law . . ."
>
> * * * * * * *
>
> "In case the error is apparent of record, and is fatal, and goes to the organization of the grand jury which found and returned the bill, the objection is availing on motion in arrest of judgment, or by motion to quash; otherwise by plea in abatement.—*Ramsey v. State*, 113 Ala. 49, 21 South. 209; *Peters v. State*, 98 Ala. 38, 13 South. 334."

In considering the applicability of *Gregg v. Maples*, supra, we make the following observations:

(1) *Gregg v. Maples* arose from a petition for writ of mandamus to reconstitute the jury roll, not from a motion to quash an indictment.

(2) The Montgomery Jury Commission was acting under federal court order stating that, "The jury commission *shall* examine the voting list and make an alphabetical list therefrom . . ." (Emphasis supplied.)

(3) Failure to comply with the state statutes, detailing the composition of the jury roll, is not a denial of a constitutional privilege.

(4) As it relates to composition of grand juries, the fraud necessary to quash an indictment is construed by us to encompass only willful and deliberate omissions of persons eligible to serve which would result in some demonstrable prejudice to the appellant.

To us there is a great difference between the body that merely accuses, via indictment, and the body that determines guilt or innocence. The requirements of due process and equal protection are more strictly observed in the trial phase (finding of guilt or innocence) than in the accusatory proceedings. For instance, in grand jury proceedings the accused has no right to be present, to confront witnesses, to cross-examine or to be represented by counsel, as he does at trial.

While grand juries and petit juries are drawn from the same jury lists, it is more important that an accused have the right to a much broader inquiry as to how the trial jury was selected than how his accusers were impaneled. There is no challenge to the petit jury composition on the grounds of fraud in the instant case. In light of Title 15, §§ 278, 285, we will not extend the rationale of *Gregg v. Maples*, supra, to apply to the

instant challenge of the grand jury. We hold to the rationale expressed in *Higginbotham*, supra. If the application of "fraud in law" as expressed in *Gregg v. Maples*, is extended to challenges of grand juries by motions to quash, it must be done by the Supreme Court, not by this Court.

Here, the appellant has failed to demonstrate how he was prejudiced by an indictment returned by a grand jury drawn from a list containing names of 6,070 voters of Montgomery County. Prejudice in jury selection (grand or petit) must be established by the appellant. *Johnson v. State*, Ala.Cr.App., 335 So.2d 663, cert. denied Ala., 335 So.2d 678 (1976).

As to exclusion of nineteen and twenty year olds from the jury roll, we have previously disposed of that argument in favor of the State in *Giddens v. State*, Ala.Cr.App., 333 So.2d 615 (1976). Also see: *Bowens v. State*, 54 Ala.Cr.App. 491, 309 So.2d 844 (1975).

II

The appellant moved to exclude the State's evidence at trial, arguing that a fatal variance existed between the indictment and the proof produced. The appellant now contends the trial court erred to reversal in denying his motion to exclude. The indictment was, to say the least, complex. Count I of the indictment, upon which the verdict of guilty was based, was drawn by using a combination of two statutes, since no Code form existed for the specific offense charged.

Act No. 232, Acts of Alabama 1967, approved August 16, 1967 (Title 14, §326(a)(1)-(a)(4), Code of Alabama, 1973 Cumulative Pocket Part) establishes the crime of inciting to a felony. The specific felony which Count I alleges that the appellant incited is bribery (Title 14, § 63, Code of Alabama 1940). Count I charges:

"The Grand Jury of Said County charge that, before the finding of this indictment, Kenneth Hammond, alias Ken Hammond, alias 'Bozo' Hammond, whose true name is unknown otherwise than stated, did unlawfully incite, towit: John Moore, Rex Moore or Charles Price to a felony, towit: Bribery of an executive, legislative or judicial officer, in that the said Kenneth Hammond, alias Ken Hammond, alias 'Bozo' Hammond, induced, procured or caused, or made an effort or endeavor to induce, procure or cause the said, towit: John Moore, Rex Moore, or Charles Price to corruptly offer, promise or give to an executive, legislative or judicial officer, towit: Kenneth Hammond, President, Public Service Commission, State of Alabama, after his election to said office, a gift, gratuity or thing of value, towit: money or proceeds from or in connection with operation of certain vending machines in towit: South Central Bell Telephone Company buildings; Montgomery, Alabama, in the amount of, towit: $10,000 with the intent to influence the act, vote, opinion, decision or judgment on a cause, matter or proceeding then pending or which may be by law brought before the said Kenneth Hammond in his official capacity as President, Public Service Commission, State of Alabama, towit: a telephone rate or charge increase required by South Central Bell Telephone Company styled, towit: South Central Bell Telephone Company, Petitioner: Petition For Approval Of New Schedules Of Rates And Charges For Intrastate Telephone Service, Alabama Public Service Commission Docket 16966, contrary to law and against the peace and dignity of the State of Alabama."

The State drafted the indictment and is bound by its wording. It charges incitment to bribery by three alternatives alleged in the disjunctive. We summarize Count I of the indictment as charging that the appellant incited, Rex Moore, **or** John Moore, **or** Charles Price to:

(1) Corruptly offer, promise or give;

(2) To appellant as an executive, legislative or judicial officer;

(3) A gift, gratuity, or thing of value;

(4) With intent to influence appellant's vote;

(5) On a pending Bell rate increase.

A major problem in testing Count I against the appellant's allegation of variance, is the use of the disjunctive, "or." When criminal conduct is alleged in an indictment in the disjunctive, we must view the proof against each disjunctive allegation separately.

We summarize the elements of bribery, enumerated in Title 14, § 63, as follows:

(1) To corruptly offer, promise or give;

(2) To any executive, legislative or judicial officer;

(3) Any gift, gratuity, or thing of value;

(4) With intent to influence his act, vote, opinion, decision or judgment;

(5) On any cause, matter or proceeding then pending or which may be brought before such officer in his official capacity.

A

The first two alternatives of Count I are not sustained by the proof. Although the jury could reasonably find that appellant incited the Moores to offer him money, there is absolutely no proof that the offer was for the purpose of influencing appellant's vote on the Bell rate request. There was not one iota of evidence that the Moores had any interest whatsoever in

the rate request. The Bell rate request was never mentioned in any conversation between appellant and the Moores. If Count I is sustained by the proof, it must be on the third alternative concerning Charles Price.

B

It is clear that Price acted on several occasions with the intent to influence appellant's official actions as such actions related to Bell's business. However, there is no evidence that Price was incited to pay any money to appellant. For Count I to stand as it relates to Price, the evidence must prove that appellant incited Price to give him, "a gift, gratuity or thing of value" in order to influence appellant's vote on the rate request. The question then is whether the doing of an act may constitute the giving of a thing of value, within the meaning of the bribery statute.

"A gift or gratuity will not support an indictment for soliciting or accepting a bribe unless the thing requested or accepted was something of value to the person seeking or obtaining it." However, the doing of an act which will ultimately result in a payment being made to the appellant is considered a thing of value in the law. *Commonwealth v. Hayes*, 311 Mass 21, 40 N.E.2d 27, 31 (1942); *Commonwealth v. Hurley*, 311 Mass. 78, 40 N.E.2d 258 (1942).

12 Am.Jr.2d, Bribery, § 7, states:

> "It seems that a bribe must involve something of value that is used to influence action or nonaction. Value, though, is determined by the application of a subjective, rather than an objective, test, and the requirement of value is satisfied if the thing has sufficient value in the mind of the person concerned so that his actions are influenced."

It was held in Ohio in *Scott v. State*, 107 Ohio St. 475, 141 N.E. 19 (1923), that it is impossible to establish value which is universal, and further that, "the test of the value must necessarily be the desire of some person or persons not necessarily of most persons or all persons, for the thing in question."

We held in *McDonald v. State*, 57 Ala.App. 529, 329 So. 2d 583, cert. quashed 295 Ala. —, 329 So.2d 596 (1975), that giving or promising to give sexual favors in exchange for official action was a sufficient thing of value to support a charge of bribery.

11 C.J.S., Bribery, § 2, p. 845, states:

> "In order to constitute the offense there must be the promise, gift, or acceptance of money or other thing of value, not necessarily of pecuniary or intrinsic value, but value in the sense of a personal advantage of some sort to be derived by the recipient." (Footnotes omitted.)

In *Caruthers v. State*, 74 Ala. 406 (1883), our Supreme Court held that the promise of a defendant to a juror to chop cotton for a week if the juror would clear him constituted a gratuity or a thing of value. The Court stated:

> "The substance of the offer or promise proved to have been made by the defendant to the juror, Bell, was that he would '*chop cotton* a week,' if the juror would clear or acquit him. This, in our opinion, was 'a gift, *gratuity*, or *thing of value*,' within the meaning of the statute. The word *thing* does not necessarily mean a *substance*. In its more generic signification it includes an act, or action. So, the word gratuity embraces any recompense, or benefit of pecuniary value. . . . The evil of the offense is its tendency to pervert the administration of justice, by tempting jurors to act contrary to the known rules of honesty and integrity. The promise of the de-

fendant to give his *labor* or *services*, as a reward for the corrupt violation of the juror's sworn duty, is a 'gift, gratuity, or thing of value,' within the signification of the statute."

A similar explanation is found in *Commonwealth v. Albert*, 310 Mass. 811, 40 N.E.2d 21, 26 (1942):

> "The promise to do an act that would result in a pecuniary gain to the defendant would undoubtedly come within the scope of the statute. . . . It is enough if a reward or personal advantage will accrue to the officer for the performance of the act and that he considers the value of that which he will receive so highly as to permit it to influence his official conduct. . . . Of course, if all the officer intended from the performance of the act was the self-satisfaction from the fact that he is empowered to command obedience or the sentiment that comes from conferring a kindness upon another, then he would not receive anything to which the law would attach value. . . ."

If appellant, in ordering Price to have the machines removed, was acting out of revenge, or for the self-satisfaction he would receive by punishing the Moores for not meeting his earlier demands, then "he would not receive anything to which the law would attach value." However, the jury heard the witnesses and observed their demeanor. They listened to the testimony of the Moores, Price and of the appellant. "It could properly be found upon the evidence, together with the inferences which need not be necessary or unescapable so long as they are reasonable and warranted that it had been proved beyond a reasonable doubt," that the appellant intended that his threat, transmitted through Price, would cause the Moores to give in and pay him money. *Commonwealth v. Albert*, supra. Price's action could thus be considered "a thing of value" to appellant.

C

Appellant contends that he is not an executive, legislative, or judicial officer within the meaning of the bribery statute and, therefore, could not legally be convicted under Count I of the indictment. The Constitution of Alabama 1901 sets out the members of the executive, legislative and judicial departments, respectively in Article 5, § 112, Article 4, § 44 and Article 6, § 139, et seq. Neither the P.S.C., nor the position of president of the P.S.C. is listed in the above articles of the Constitution. However, the State contends that appellant comes within the purview of the bribery statute because, as president of the P.S.C., he performed executive, legislative and judicial *functions*.

We find no Alabama cases directly in point, however, we are persuaded by authority of cases from a number of other jurisdictions.

Most persuasive is *Weil v. Black*, 76 W.Va. 685, 86 S.E. 666 (1915). There, the Supreme Court of West Virginia, in interpreting a bribery statute similar to Alabama's held that a member of the Public Service Commission was a legislative or judicial officer within the meaning of that statute. The State quoted in its supplemental brief what we believe to be the heart of the reasoning expressed in *Weil v. Black*:

> "Members of the public service commission are included in the descriptive terms of the above statute 'any executive or judicial officer.' Those are general terms, intended to include all public officers whose duties are either judicial or executive. The term 'executive' is not there limited to the officers enumerated in section 1, art. 7, of the Constitution, as constituting the executive department of the state government, but it is designed to embrace all officers, whether elected or appointed, whose duties pertain to that branch of

the government. Being public officers, whose jurisdiction extends over the whole state, it necessarily follows from the apportionment by the Constitution of all the powers of government among three departments, denominated therein as the legislative, the executive, and the judicial departments, that the duties of all public officials must fall within some one of those three departments. A fourth department, having powers distinct from the three named, could not constitutionally exist. That the public service commissioners are not included in the terms 'members of the Legislature,' must be admitted; that they are included in one or the other of the terms 'executive or judicial officers' we think is clear, and it is sufficient, for the purposes of this writ of error, to class them under the head of executive officers. If their duties are so varied that some of them may properly be classed as executive or ministerial, and others as judicial, they could, for the purposes of the bribery statute, be classed under either of the two departments. In so far as they are empowered to investigate rates and charges of public service corporations, and to determine their reasonableness or unreasonableness, they would seem to be performing a quasi judicial function, while, in ascertaining what is a just rate for services to be rendered by such corporations, and prescribing such rate, as a rule to be obeyed in the future, their action would seem to partake somewhat of a legislative character; and in compelling obedience to its orders, by proper proceedings in court, as section 5 of the act creating it requires it to do, its duties are ministerial coming clearly within the functions of the executive department of government."

We take judicial notice that there are scores of officers not listed in the Constitution under any one of the three branches of government. We do not construe this circumstance to have created a fourth branch of government. As stated in *Peoples v. Salsbury*, 134 Mich. 537, 544, 96 N.W. 936 (1903):

"The scheme of our government divides all governmental functions into three classes of powers, viz., the legislative, the executive, and the judicial; and the officers who perform these respective functions must be included in the three classes of officers who exercise these powers. It is difficult to conceive of an officer exercising any of the powers of government not being within one of these classes; and when, an officer cannot be classed with the legislative or judicial, he must come within the executive class, for, in a sense, all officers execute the laws . . ."

Of similar import are: *Davis v. State*, 70 Tex.Cr.R. 524, 158 S.W. 288 (1913); *State v. Womack*, 4 Wash. 19, 29 P. 939 (1892); *Sheely v. People*, 54 Colo. 136, 129 P. 201 (1913); *State v. Emory*, 55 Ida. 649, 46 P.2d 67 (1935).

While appellant, as president of the P.S.C., was certainly not a member of the legislature, he still performed legislative functions since ratemaking is such a function which could be exercised by the legislature or delegated by it to the P.S.C. See: *Walker v. Alabama Public Service Commission*, 292 Ala. 548, 297 So.2d 370 (1974); *Murray v. Service Transport, Inc.*, 254 Ala. 683, 49 So.2d 221 (1950); *State v. Southern Bell Telephone and Telegraph Company*, 274 Ala. 288, 148 So.2d 229 (1962).

Although Article 5, § 112, does not list members of the P.S.C. as being members of the executive department, it could not be seriously argued that such officers do not perform duties normally associated with the executive branch of government. Therefore we find that appellant, as president of the P.S.C., was an executive, legislative or judicial officer within the meaning of our bribery statute, Title 14, § 63, supra.

Of the three alternatives charged in Count I, the State totally fails to prove two and barely proves the third. While the evi-

dence at the trial may prove a series of highly questionable transactions between appellant, Price and the Moores, for the purpose of this appeal, such conduct can only be viewed in the context of the statute and the specific wording of the indictment. A complex and many-faceted count is the basis for depriving appellant of his liberty. We have been presented with a hodge-podge of facts and are told that upon one theory or another, they substantially prove every material allegation of the indictment. In order to find one theory or one alternative which would support the instant conviction, it has been necessary to fit facts together like connecting pieces of a complex jigsaw puzzle. When the task is completed, we find only one theory from which a jury could draw an inference of guilt. The evidence that appellant incited Price to bribe him, pursuant to the wording of Title 14, § 63, is far from overwhelming. Yet, we find it to be sufficient to meet the bare minimum standards to support the verdict of the jury.

III

As one ground of his motion to quash the indictment, appellant complains that he was denied a fair trial due to prejudicial pretrial publicity. Appellant proved, through witnesses, that there was substantial pretrial publicity. He did not, however, prove that it prejudiced his right to a fair trial. The voir dire examination of the jury panel shows no prejudicial effect upon the jury resulted from the publicity. We find no error on the part of the trial court in its ruling against the appellant in this regard. *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); *Mathis v. State*, 52 Ala.App. 668, 296 So.2d 755 (1973) cert. quashed 292 Ala. 732, 296 So.2d 764; *Gray v. State*, 56 Ala.App. 131, 319 So.2d 750 (1975); *Yeomans v. State*, 55 Ala.App. 160, 314 So.2d 79 (1975).

IV

Appellant contends that the trial court erred in refusing to grant his motion to produce certain evidence presented to the grand jury. He likewise contends that there was no legal evidence before the grand jury. The record reflects that Rex Moore and John Moore testified before the Grand Jury which indicted appellant. It has long been law in Alabama that where it appears that witnesses were examined before the grand jury, inquiry into the sufficiency of the evidence there presented is not permitted. *Loyd v. State*, 279 Ala. 447, 186 So.2d 731 (1966); *Washington v. State*, 63 Ala. 189 (1879). See also: *State ex rel. Baxley v. Strawbridge*, 52 Ala.App. 685, 296 So.2d 779 (1974); *Bowens v. State*, 54 Ala. App. 491, 309 So.2d 844 (1974). We find no error in the trial court's refusal to open the grand jury records to appellant. *Thigpen v. State*, 49 Ala.App. 233, 270 So.2d 666 (1972).

Neither was appellant denied a constitutional right when the State nol prossed the charges in the county court immediately prior to his preliminary hearing and then proceeded in circuit court by way of indictment. It has long been held that an accused has no absolute right to a preliminary hearing in Alabama after an indictment has been returned by the grand jury. *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed. 2d 387 (1970); *Campbell v. State*, 278 Ala. 114, 176 So.2d 242 (1965); *Johnson v. State*, Ala.Cr.App., 335 So.2d 663 (1976), cert. denied Ala., 335 So.2d 678.

V

The appellant contends that the trial court erred in admitting into evidence the tapes and transcripts of conversations between the appellant and Rex Moore. The tapes were obtained without a warrant, which the appellant contends violates the United States and Alabama Constitutions.

A

A review of the so-called "bugged agent" cases leads us to the inescapable conclusion that the lack of a warrant in this case did not violate the Fourth Amendment to the United States Constitution. *On Lee v. United States*, 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270 (1952); *Lopez v. United States*, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963); *Osborn v. United States*, 385 U.S. 323, 87 S.Ct. 429, 17 L.Ed. 2d 394 (1966); *United States v. White*, 401 U.S. 745, 91 S. Ct. 1122, 28 L.Ed.2d 453 (1971). The above cases are also persuasive authority regarding the interpretation of the Alabama Constitution, but they are not binding.

Article 1, § 5, Constitution of Alabama 1901, reads as follows:

> "That the people shall be secure in their persons, houses, papers, and possessions from unreasonable seizure or searches, and that no warrants shall issue to search any place or to seize any person or thing without probable cause, supported by oath or affirmation."

Recently the Supreme Court of Michigan was faced with a case very similar to the case before us. There, a law enforcement officer, without a warrant, simultaneously monitored a conversation between a defendant and an informant. The defendant contended that the law enforcement officer's testimony concerning the conversation should have been excluded under the Michigan Constitution. The Michigan Supreme Court agreed and held that a search warrant should have been issued prior to the institution of the participant monitoring procedure. *People v. Beavers*, 393 Mich. 554, 227 N.W.2d 511 (1975).

Article 1, § 11, Constitution of Michigan 1963, which is almost identical to the aforementioned provision in the Alabama Constitution, reads as follows:

> "The persons, houses, papers, and possessions of every person shall be secure from unreasonable searches and seizures. No warrants to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. . . ."

While we express no opinion as to the efficacy of the above argument, we believe it is worthy of consideration. Especially noteworthy is the following statement from *Beavers:*

> "Participant monitoring is practiced extensively throughout the country and represents a vitally important investigative tool of law enforcement. Equally significant is the security and confidence enjoyed by our citizenry in knowing that the risk of intrusion by this type of electronic surveillance is subject to the constitutional protection against unreasonable searches and seizures. By interposing the search warrant requirement prior to engaging in participant monitoring, the risk that one's conversation is being intercepted is rightfully limited to circumstances involving a party whose conduct has provided probable cause to an independent magistrate to suspect such party's involvement in illegal activity. The warrant requirement is not a burdensome formality designed to protect those who would engage in illegal activity, but, rather a procedure which guarantees a measure of privacy and personal security to *all* citizens. The interests of both society and the individual should not rest upon the exercise of the unerring judgment and self-restraint of law enforcement officials. Our laws must ensure that the ordinary, law-abiding citizen may continue to engage in private discourse, free to speak with the uninhibited spontaneity that is characteristic of our democratic society."

The State contends that a warrant is not required to surreptitiously record a conversation if one of the parties is a will-

ing participant in the recordation procedure. The State cites *Alonzo v. State ex rel. Booth*, 283 Ala. 607, 219 So.2d 858 (1969) as being dispositive of the issue. We do not agree. *Alonzo* appears to be clearly distinguishable on its facts. In *Alonzo* it was held that a warrant was not necessary in order for a *private citizen* to record telephone conversations in which he participated. In the present case, as in *Beavers*, supra, the police *instigated, encouraged*, and *participated* in the recording operation. *Alonzo* discloses no such police involvement.

The constitutionality of warrantless recording operations, which are instigated by law enforcement officers, must ultimately be based on public policy considerations. These policy considerations, which include numerous intangible factors, are adequately set out in *On Lee, Lopez, Osborn, White*, supra, and the vigorous dissents thereto. Also see: Amsterdam, "Perspectives on the Fourth Amendment," 58 Minn.L.Rev. 349 (1974); Kamisar, LaFave and Isreal, *Modern Criminal Procedure*, pp. 416-60. By the proceeding [sic] digression, we should not be construed to imply that the law enforcement agencies of Alabama have acted in any way inconsistent with the Alabama Constitution. We merely point out that the constitutionality of the use by the State of "bugged" agents, absent a warrant, has not been conclusively decided under the Alabama Constitution by our Supreme Court.

Based upon the federal decisions cited above, and based upon the very slight analogy *Alonzo* affords (see dissent, relying upon *Lopez*, supra) we find that no constitutional duty was breached by the failure of officers to obtain a warrant to tape record appellant's conversation with Rex Moore in the instant situation.

B

The electronic tape recording of the July 8, 1975, conversation between Rex Moore and appellant was introduced into

evidence over vigorous objection, as was the stenographic transcript of the recording. That transcript was typed by a secretary in the Attorney General's Office under the direct supervision of one of the investigators who overheard the conversation as it was being recorded. It was authenticated by both. See: *People v. Albert*, 6 Cal.Reptr. 473, 182 C.A.2d 729 (1960).

Appellant contends the recording contained inaudible portions and that the typed transcript furnished by the State supplied words which were not audible on the tape. We have carefully listened to the recording and compared it to the State's transcript, and there are inaudible portions in the tape where words or phrases are supplied in the typed transcript. They are, however, minor in nature and served to only cast slight doubt upon the weight which should be given the recording by the jury. See: *Tumminello v. State*, 10 Md.App. 612, 272 A.2d 77 (1971).

Because the recorded conversation took place in a popular truck stop restaurant, the recording is replete with background noise of dishes clattering, customers and waitresses conversing, a baby crying, and the muffled roar of truck engines. Rex Moore's voice and his foul language come in loud and clear, as he had the microphone on his person. The appellant's voice is faintly heard for the most part, and altogether unheard in other parts. The tape recording is of poor quality and, without the Attorney General's transcript to follow as it is played, the recording would shed very little light on the transaction, other than showing that Moore and appellant met and discussed something.

The question before us is whether admission of the recording and transcript violated any rules of evidence. We think not. First, the recording was played outside the presence of the jury for the circuit judge. Both sides had an opportunity, *in camera*, to point out objections to the recording or explain away ambiguities. *Boulden v. State*, 278 Ala. 437, 179 So.2d 20

(1965); *Wright v. State*, 38 Ala.App. 64, 79 So.2d 66 (1954). Secondly, the trial judge, after review, ruled the recording and transcript were admissible for whatever weight the jury wished to give them; a ruling which is subject to our limited review only as to abuse of discretion. Thirdly, the recording was not the only evidence offered, and other witnesses corroborated the substance of the conversation recorded. *Wright*, supra. Fourthly, the appellant testified that the recording was basically true and correct. We, therefore, find the recording and transcript thereof to be admissible for whatever weight they may have been accorded by the jury. *Lykes v. State*, 54 Ala.App. 7, 304 So.2d 249 (1974).

VI

There was no exception or objection to the trial court's oral charge to the jury. The trial judge refused eleven written requested charges proposed by the appellant, and gave twenty-five. We have carefully examined each of the refused charges and find they were either affirmative in nature, and thus properly refused under the evidence, or were incorrect statements of applicable law, abstract in nature under the evidence, or fully and substantially covered in the given charges or in the court's oral charge. No error resulted in their refusal. Title 7, § 273, Code of Alabama 1940; *Lebo v. State*, 55 Ala.App. 624, 318 So.2d 319 (1975).

We have reviewed the record, consisting of six volumes containing 323 pages of pretrial testimony on motions and pleadings and 723 pages of testimony on the merits and trial court records. We have also examined the numerous exhibits accompanying the record. The appellant raised 58 issues in his original brief and reply brief which have been considered by this Court. After receipt of briefs, we directed that supplemental briefs be filed expanding on three crucial issues. Those issues have been addressed in this opinion along with certain other issues raised by appellant which merited serious consideration. Our review convinces us that, although many close questions of law arose, the trial court committed no error prejudicial to the appellant.

AFFIRMED.

All the Judges concur except Harris, J., concurs in the result only. Bowen, J., not sitting.

APPENDIX B

The State of Alabama — Judicial Department

The Supreme Court of Alabama

October Term, 1977-78

Ex parte: Kenneth Hammond

Petition for Writ of Certiorari to the Court of Criminal Appeals

(In Re: Kenneth Hammond

S. C. 2515 v.

State of Alabama)

Beatty, Justice.

The petition for writ of certiorari to the Court of Criminal Appeals is quashed as improvidently granted.

Writ Quashed.

Torbert, C. J., Bloodworth, Maddox, Jones, Almon and Shores, JJ., concur.

Faulkner and Embry, JJ., dissent.

Faulkner, Justice (dissenting).

By quashing the writ the majority of this court lets stand the judgment of the Court of Criminal Appeals. I would reverse and remand because, in my opinion, Hammond has been denied due process of law, under the 14th Amendment to the Constitution of the United States.

Kenneth Hammond, while serving as a Commissioner on the Alabama Public Service Commission was indicted for inciting to a felony-bribery. Under Count 1 of the indictment the case went to the jury, charging Hammond in the disjunctive with inciting Rex Moore or John Moore of Tops Vending Company, or Charles Price of South Central Bell Telephone Company, to:

1. Corruptly offer, promise or give
2. To Hammond as an executive, legislative or judicial officer;
3. A gift, gratuity, or thing of value, to-wit money or proceeds from or in connection with the operation of certain vending machines in, to-wit South Central Bell Telephone Company buildings, Montgomery, Alabama, in the amount of to-wit $10,000;
4. With intent to influence Hammond's vote, opinion, decision or judgment on a cause, matter or proceeding pending before him in his official capacity as President, Public Service Commission, to-wit a telephone rate or charge increase requested by South Central Bell Telephone Company.

Hammond was convicted by a jury, and the trial court sentenced him to three years in the penitentiary. On appeal to the Court of Criminal Appeals, affirmed. We granted certiorari on the alleged ground of whether Hammond received constitutional due process of law by being convicted without substantial evidence on all elements of the crime to support the conviction. The majority did not write an opinion giving their reasons for affirmance, yet it is obvious that the Court of Criminal Appeals had grave doubts about this case. The court said:

"A complex and many-faceted count is the basis for depriving appellant of his liberty. We have been presented

with a hodge-podge of facts and are told that upon one theory or another, they substantially prove every material allegation of the indictment. In order to find one theory or one alternative which would support the instant conviction, it has been necessary to fit facts together like connecting pieces of a complex jigsaw puzzle. When the task is completed, we find only one theory from which a jury could draw inference of guilt. *The evidence that appellant incited Price to bribe him, pursuant to the wording of Title 14, § 63, is far from overwhelming. Yet, we find it to be sufficient to meet the bare minimum standards to support the verdict of the jury.*" (Emphasis added.)

Further, the court said:

"The first two alternatives of Count 1 are not sustained by the proof. Although the jury could reasonably find that appellant incited the Moores to offer him money, there is absolutely no proof that the offer was for the purpose of influencing appellant's vote on the Bell rate request. There was not one iota of evidence that the Moores had any interest whatsoever in the rate request. The Bell rate request was never mentioned in any conversation between appellant and the Moores. If Count 1 is sustained by the proof, it must be on the third alternative concerning Charles Price."

The majority, by quashing the writ, agrees with the Court of Criminal Appeals. By doing so, they have introduced a new standard of evidence to support a conviction—bare minimum standards—in the field of criminal law. This is a dangerous departure from the substantial evidence rule, and the "bare minimum standards" violate Hammond's constitutional rights. In Ex Parte Grimmett, 228 Ala. 1, 152 So. 263 (1963) this court held that *there must be substantial evidence to prove all the elements of the charge*. The scintilla rule of evidence applicable in civil cases does not apply to criminal cases because the presumption of innocence, shielding every prisoner at bar, is not overcome by a mere scintilla of evidence.

Here, there was no evidence at all that Hammond was offered, promised, or given any gift, gratuity, or thing of value to influence his vote on a pending rate case. This court held in *Clemons v. City of Birmingham*, 277 Ala. 447, 171 So. 2d 456 (1965) that *it is a violation of due process of the 14th Amendment to the Constitution of the United States to convict and punish a person without any evidence at all of his guilt*. Where is there any evidence at all of guilt here that Hammond incited Charles Price to bribe him to vote favorably on a pending rate case?

Price testified that in 1974, Hammond told him that he had friends in the vending machine business and wanted to know whether machines could be put in some of Bell's buildings. He and Hammond discussed, on several occasions, whether the machines (Moore's machines) had been placed in Bell's buildings. Finally, the machines owned by Moore were placed in the buildings in January, 1975. Two or three months later, he testified, Hammond told him to take out the machines. On direct examination Price testified:

"Q. Did you bring the subject up about these vending machines or did Mr. Hammond?

"A. Mr. Hammond.

"Q. Tell the court and the jury, then, what was said at that time, on that occasion, with reference to these vending machines by the defendant?

"A. Well, he started asking me to take them out. I said, 'Well my Lord, you were after me a number of weeks to put them in and they've been in two or three months and why do you want me to take them out?' And, as I recall, he said, 'They are a bunch of crooks and get the machines out.'

"Q. Did you take them out or take any steps to get them taken out?

"A. Not immediately, this went on, you know, several times, and finally it got right obvious he was pushing pretty hard and I needed to do something.

* * * * * * *

"Q. Calling your attention up then to the latter part of June, or the first part of July, had you done anything up to that point, say, the first of July, that—with reference to getting them out?

"A. I'm not sure just when the date was that I went out to see the Moores, but it was around that time, and I'm not sure when it was. It was right around the first of July.

"Q. Did Mr. Hammond say anything to you about—with reference to—to refresh your recollection, that you had talked long enough, that you better have some action on them?

"A. Yes, sir. As I recall, the last conversation I had before I went out to see them, that he told me then, he said, 'We been talking about this for a long time. We are not going to get along, and I mean for you to get these machines out'."

It is this evidence that the State must rely on to support the inciting of the bribery charge as it related to Price. To this the Court of Criminal Appeals responded (the court had already said that *"there is no evidence that Price was incited to pay any money to appellant* [*Hammond*]"): "If appellant, in ordering Price to have the machines removed, was acting out of revenge, or for the self-satisfaction he would receive by punishing the Moores for not meeting his earlier demands, then 'he would not receive anything to which the law would attach value.' However the jury heard the witnesses and observed their

demeanor. They listened to the testimony of the Moores, Price and of the appellant. 'It could properly be found upon the evidence, together with the inferences which need not be necessary or unescapable so long as they are reasonable and warranted that it had been proved beyond a reasonable doubt,' that appellant intended that his threat, transmitted through Price, would cause the Moores to give in and pay him money. . . . Price's action could thus be considered 'a thing of value' to appellant." (Emphasis added.) This is, indeed, a bizarre holding, yet the majority of this court has approved it without saying why.

It must be remembered that Hammond was charged with inciting Price to corruptly offer, promise, or give him $10,000, with intent to influence his vote on a rate case pending before the Public Service Commission. The proof just does not agree with the charge.

It is my opinion that Hammond has been denied due process of law. I am shocked that a "bare minimum standard of evidence to sustain a conviction" rule adopted by the Court of Criminal Appeals, has been approved by a majority of this court. Is one class of defendants subject to the "substantial evidence rule" and holders of a political office subject to the "bare minimum standard" rule? What has happened to that saying, "Equal justice under the law" without regard to that person's persuasion?

I would reverse and remand for a new trial.

Embry, J., concurs.

APPENDIX C

Mailing Address:
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Telephone: 832-6480

Office of
Clerk of the Supreme Court
State of Alabama
Montgomery

Re: SC 2515

Ex Parte: Kenneth Hammond

Petition for Writ of Certiorari to the
Court of Criminal Appeals

(Re: Kenneth Hammond v. State of Alabama)
Appellant Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

—— Appeal docketed. Future correspondence should refer to the above SC number.

—— Court Reporter granted additional time to file reporter's transcript to and including

—— Clerk/Register granted additional time to file clerk's record/record on appeal to and including

—— Appell.... granted 7 additional days to file briefs to and including

—— Appellant(s) granted 7 additional days to file reply briefs to and including

—— Record on Appeal filed

—— Appendix Filed

—— Submitted on Briefs

—— Petition for Writ of Certiorari denied. No opinion.

—— Application for rehearing overruled. No opinion written on rehearing.

—— Permission to file amicus curiae briefs granted.

J. O. SENTELL
Clerk, Supreme Court of Alabama

APPENDIX D

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 326 (a1-a4) of Title 14, Code of Alabama (1967) provides:

SECTION 326 (a1). DEFINITIONS.

For purposes of this division, the following words and phrases shall have the respective meanings ascribed by this section:

(a) INCITING TO A FELONY. The effort or endeavor by one person to induce, procure or cause another to commit a specific felony.

(b) INCITING TO A MISDEMEANOR. The effort or endeavor of one person to procure or cause another to commit a specific misdemeanor.

SECTION 326 (a2). INCITING TO A FELONY.

Any person who incites to a felony shall be imprisoned in the penitentiary for not less than one nor more than 10 years; provided, however, that, if such person incites

to a felony under circumstances and with results which would render him an aider or abettor in the commission of such felony, he may be indicted, tried and punished as a principal in the commission of such felony or, at the election and choice of the state, he may be proceeded against as a violator of this statute; but in no event shall a person be convicted and punished for the commission of the same criminal act or acts both as a violator of this statute and as a principal in the commission of the felony to which he shall have incited.

SECTION 326 (a3). INCITING TO A MISDEMEANOR.

Any person who incites to misdemeanor must be fined not more than $500.00 and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than six months.

SECTION 326 (a4). ARTICLE CUMULATIVE; CRIMINAL SOLICITATION.

This article is intended to be cumulative and supplementary to existing law or laws. It is not intended to supersede either the common law or any penal statute now in force. The common law offense of criminal solicitation shall continue to be recognized in this state.

Section 63 of Title 14, Code of Alabama (1943) provides:

SECTION 63. BRIBERY OF EXECUTIVE, LEGISLATIVE OR JUDICIAL OFFICERS.

Any person who corruptly offers, promises or gives to any executive, legislative or judicial officer or municipal officer or to any deputy clerk, agent or servant of such executive, legislative, judicial or municipal officer after his election, appointment, employment, either before or

after he has been qualified, any gift, gratuity or thing of value, with intent to influence his act, vote, opinion, decision or judgment on any cause, matter or proceeding, which may be then pending or which may be by law brought before him in his official capacity, shall on conviction be imprisoned in the penitentiary for not less than two years nor more than 10 years.

Section 247 of Title 15, Code of Alabama (1940), provides:

SECTION 247. STATEMENT OF MEANS OR INTENTS IN ALTERNATIVE.

When the offense may be committed by different means or with different intents, such means or intents may be alleged in the same count in the alternative.

APPENDIX E

The State of Alabama
Montgomery County

Circuit Court of Montgomery County, *August* Term, A.D. 1975

Count I

The Grand Jury of Said County charge that, before the finding of this indictment, Kenneth Hammond, alias Ken Hammond, alias "Bozo" Hammond, whose true name is unknown otherwise than stated, did unlawfully incite, towit: John Moore, Rex Moore or Charles Price to a felony, towit: Bribery of an executive, legislative or judicial officer, in that the said Kenneth Hammond, alias Ken Hammond, alias "Bozo" Hammond, induced, procured or caused, or made an effort or endeavor to induce, procure or cause the said, towit: John Moore, Rex Moore, or Charles Price to corruptly offer, promise or give to an executive, legislative or judicial officer, towit: Kenneth Hammond, President, Public Service Commission, State of Alabama, after his election to said office, a gift, gratuity or thing of value, towit: money or proceeds from or in connection with operation of certain vending machines in, towit: South Central Bell Telephone Company buildings, Montgomery, Alabama, in the amount of, towit: $10,000 with the intent to influence the act, vote, opinion, decision or judgment on a cause, matter or proceeding then pending or which may be by law brought before the said Kenneth Hammond in his official capacity as President, Public Service Commission, State of Alabama, towit: a telephone rate or charge increase requested by South Central Bell Telephone Company styled, towit: South Central Bell Telephone Company, Petitioner: Petition for Approval of New Schedules of Rates and Charges

for Intrastate Telephone Service, Alabama Public Service Commission Docket 16966, contrary to law and against the peace and dignity of the State of Alabama.

Count II

The Grand Jury of said County further charge that, before the finding of this indictment, Kenneth Hammond, alias Ken Hammond, alias "Bozo" Hammond, whose true name is unknown otherwise than stated, did unlawfully incite, towit: John Moore, Rex Moore or Charles Price to a felony, towit: Attempt to bribe or corruptly solicit a public officer, in that the said Kenneth Hammond, alias Ken Hammond, alias "Bozo" Hammond induced, procured or caused, or made an effort or endeavor to induce, procure or cause the said, towit: John Moore, Rex Moore or Charles Price to corruptly solicit or attempt to solicit or influence a public officer, towit: Kenneth Hammond, President, Public Service Commission, State of Alabama, by promising or agreeing to pay to the said Kenneth Hammond, a sum of $10,000, from or in connection with operation of vending machines in South Central Bell Telephone Company buildings, Montgomery, Alabama, to influence his official action as President, Public Service Commission, State of Alabama, to wit: with regard to official matters or causes pertaining to South Central Bell Telephone Company, a utility company regulated by the said Public Service Commission, contrary to law and against the peace and dignity of the State of Alabama.

Count III

The Grand Jury of said County further charge that, before the finding of this indictment, Kenneth Hammond, alias Ken Hammond, alias "Bozo" Hammond, whose true name is unknown otherwise than stated, a legislative, executive or judicial officer,

towit: President, Public Service Commission, State of Alabama, did corruptly accept or agree to accept a gift, gratuity or other thing of value, or a promise to make a gift of, towit: Money or proceeds from or in connection with the operation of certain vending machines, in towit: South Central Bell Telephone Company buildings, Montgomery, Alabama, in the amount of towit: $10,000, under an agreement, or with an understanding that his act, vote, opinion, decision or judgment would be given in a particular manner, or upon a particular side of a cause, question, or proceeding which was pending or may be by law brought before him in his official capacity as President, Public Service Commission, State of Alabama, towit: a telephone rate or charge increase requested by South Central Bell Telephone Company styled, towit: South Central Bell Telephone Company, Petitioner: Petition for Approval of New Schedules of Rates and Charges for Intrastate Telephone Service, Alabama Public Service Commission Docket 16966, contrary to law and against the peace and dignity of the State of Alabama.

/s/ JAMES H. EVANS
District Attorney, Fifteenth
Judicial Circuit of Alabama

/s/ WILLIAM G. BAXLEY
Attorney General, State of Alabama
